

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

76-7195

United States Court of Appeals
For the Second Circuit

DOUGLAS, JUDGE

UNITED STATES OF AMERICA

Appellant from the District Court of the Southern District of New York

APPELLANT'S REPLY BRIEF

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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DIMITRIOS GARIS,

Plaintiff-Appellant,

- against -

COMPANIA MARITIMA SAN BASILIO, S.A.,

Defendant-Appellee.

REPLY BRIEF

-----X

S T A T E M E N T

The within reply brief is submitted in opposition to the opposing brief of the appellee herein.

While, the matter is of less consequence because the issue of forum non conveniens is not before the court, but only that of res judicata, nonetheless it is appropriate to point out with respect to the appellee's recitation of the alleged facts that the same is contrary to the record in stating that the "defendant-appellee herein maintained its principal place of business in Piraeus, Greece" (Appellee's brief, pp. 1-2). An issue was raised in this

respect to say the least, and, on August 2, 1976 the Court of Appeals for this Circuit in Antypas v. Cia. Maritima San Basilio, S.A. (not yet officially reported) held otherwise.

Furthermore, the statement at page 3 of appellee's brief that appellant's attorneys "accepted" a letter of guarantee is likewise inaccurate. Counsel was served with such a guarantee letter but in no way "accepted" it. Furthermore, it is appropriate to note with respect to the argument made by the appellee that the previous declination of jurisdiction by Judge Mc Clean, affirmed by this Court of Appeals at 386 F.2d 155 is binding on this court, the Court of Appeals in the Antypas decision of August 2, 1976 noted that the law had changed, and, reversed a dismissal by Judge Metzner on a record substantially identical with the new one now before the court. In doing so, it noted that the facts present before Judge Mc Clean and those present before Judge Metzner were different. Necessarily, therefore, those present before Judge Mc Clean and Judge Griesa below herein were also different because the record before Judge Griesa was in all relevant respects identical with that before Judge Metzner in Antypas.

The sole point at issue on this appeal is whether the previous decision of Judge Mc Clean is res judicata of the new case now brought before Judge Griesa on behalf of the same plaintiff against the same defendant.

POINT I

THE APPELLEE ERRS IN TREATING THE
DECISION OF JUDGE MC CLEAN AS A
DECISION WITH RESPECT TO THE
JURISDICTION OF THE COURT.

In Boston and Maine Corporation v. Illinois Central R.R. Company, 396 F.2d 426, the Court of Appeals stated:

"While the briefs contain much discussion of 'jurisdiction' and 'waiver' two of the most elusive and chameleon like phrases are the legal lexicon . . .".

The words are apt in their relation to the alleged question of "jurisdiction" before the court. In point of fact there is no question of jurisdiction before the court. Forum non conveniens and declination of jurisdiction mean nothing if they do not mean that the court has jurisdiction. What they do mean is that a court may decline a jurisdiction which it has. The defendant therefore errs in citing American Surety Co. v. Baldwin, 287 U.S. 156 wherein the question was not one of forum non conveniens

wherein the Supreme Court expressly held that the lower court having had jurisdiction that was pursued to final judgment, had a situation where res judicata could apply. No question was present, as here of the establishment on a new effort of necessary pre-conditions not previously established, and wherein the court refused to reach the merits.

Indeed, as noted in our main brief, in the very case of Ripperberger v. A.C. Allyn & Co., Inc., so relied upon by appellee, on remission of that case to the District Court, Judge Goddard wrote, 27 F.Supp. 373, 374:

" . . . nor will it bar a second suit where the pleader in the prior suit failed to allege some essential jurisdictional fact which later is supplied in a new pleading."

Thus, even taking the matter as one of jurisdiction, which we claim is improper, if new facts are put before the court before a final decision on the merits which justify the jurisdiction of the court, the court has a jurisdiction which it can retain despite the previous holding and which it must, in the language of the new Antypas decision, retain.

And indeed, were the question jurisdictional as is claimed by the appellee, the terms of Rule 41(b)

of the Federal Rules of Civil Procedure which prevent the first application from being res judicata of the second. See appellant's main brief at page 7.

POINT II

THE DECISION OF JUDGE MC CLEAN WAS A RULING UPON A FAILURE OF THE PLAINTIFF TO ESTABLISH A NECESSARY "PRE-CONDITION". SUCH A RULING IS NOT RES JUDICATA ON ESTABLISHMENT OF THE APPROPRIATE PRE-CONDITION.

In Costello v. United States, 365 U.S. 265 the Supreme Court of the United States stated:

"We do not discern in Rule 41(b) a purpose to change this common-law principle with respect to dismissals in which the merits could not be reached for failure of the plaintiff to satisfy a precondition."

No less so than in Costello, Judge Mc Clean held in the original Garis case that the plaintiff had failed to establish the necessary pre-conditions to a holding that the Jones Act was applicable. The record now before the court, as distinguished from the one before Judge Mc Clean, has now been held to establish the necessary pre-condition for jurisdiction pursuant to the Jones Act. Antypas v. Cia. Maritima San Basilio S.A. (decided August 2, 1976).

The record before the court in Antypas is identical for these purposes with the one before Judge Griesa herein.

In still another case Lyle v. Bangor & Aroostook R.R. Co., 247 F.2d 683 the point is even more strongly illustrated. In the FELA case the plaintiff took his proof to the point of resting at the trial. The trial judge dismissed his case for failure to make out a prima facie case of negligence. He then instituted a new case and insisted upon the right to a judgment on the same facts previously presented to the first court. The Court of Appeals expressly stated that if he had presented new material bearing on the question, he could have gone to trial and possibly recover a verdict. It was only the failure to present new or additional material that required dismissal of the second case.

Thus, if the question is held to be whether or not a necessary pre-condition has been established, then, the previous holding cannot be res judicata herein.

POINT III

THE OTHER CASES CITED BY THE
APPELLEE ARE ALL DISTINGUISHABLE.

Much point is made by the appellee of the

declination also granted by the State court. Again, the situation is entirely distinguishable. A State court unlike a Federal court is under no obligation to retain jurisdiction of a FELA or a Jones Act case. Douglas v. New Haven R. Co., 279 U.S. 377; see also Hughes v. Fetter, 341 U.S. 609 and Parsons v. Chesapeake, 375 U.S. 71 wherein the Supreme Court held that declination of jurisdiction in the State court was not a bar to the institution of an action in the Federal court. In this respect the applicable law is different from an application to decline jurisdiction in a Federal court. Antypas v. Cia. Maritima San Basilio, S.A., supra, wherein, in the presence of substantial connecting factors, the jurisdiction is mandatory.

Whereas, the appellee in its Point II argues that there have been no legal or factual changes as claimed by the appellant, the decision in Antypas likewise demonstrates that there have been both legal and factual changes.

Again, in its Point III, the appellee cites the case of Brillis v. Chandris, Inc., 315 F.Supp. 520 without noting that Judge Dawson expressly stated in that opinion that in the presence of sufficient connecting factors he would have no choice but to retain jurisdiction.

So also in the case of Hernandez v. Cali, Inc., 27 N.Y.2d 903 cited by the appellee herein. The appellee fails to point out that the facts before the court in that case absolutely precluded the application of the Jones Act. As noted heretofore a State court can decline jurisdiction of a Jones Act or a FELA case, and could thus have done so in the Hernandez case, if there were sufficient connecting factors present. It expressly found however that such was not the case so that on double ground the Hernandez case has no application.

The case of Anastasiadis v. SS Little John, 346 F.2d 281 is also quite beside the point. That was not a case involving the Jones Act or the FELA or in fact involving any claim wherein jurisdiction was mandated in the presence of sufficient connecting factors. It was a case in admiralty on a claim wherein an admiralty court could keep or decline jurisdiction in the exercise of a sound expression. It has nothing to do with this case.

CONCLUSION

THE HOLDING OF THE DISTRICT
COURT SHOULD BE REVERSED.

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STATE OF NEW YORK)
: SS.
COUNTY OF NEW YORK)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 4 day of August 1977 deponent served the within Brief upon:

Pellegrino & Giuffra, Esqs.

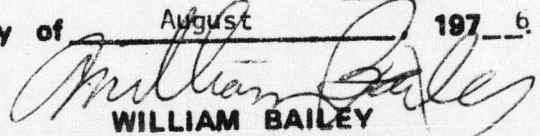
attorney(s) for
Defendant-Appellee

in this action, at
576 Fifth Ave.
NYC 10036

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.


Robert Bailey

Sworn to before me, this 4
day of August 1977.


WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945

Qualified in Richmond County
Commission Expires March 30, 1977